Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	File No. NSD-L-99-34
	)	

REPLY COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

First facilities-based interexchange carriers ("FIXCs") argue from the premise that, regardless of the relative efficiencies and effectiveness of the current rule and the old rule, the current rule is basically unfair because it "foists" onto FIXCs tracking and payment obligations that "properly" belong to switched-based resellers ("SBRs"). This premise is incorrect. The statute makes it the Commission's priority to "ensure that payphone service providers ["PSPs"] are fairly compensated" for every call. The statute does not specify who should pay the compensation. The primary consideration in selecting the payer[s], therefore, must be the statutory purposes to ensure fair compensation of PSPs and to promote widespread deployment of payphone service.

Under these criteria, there can be little dispute that the FIXC-pays system best serves the statutory purposes. As the FIXCs admit, SBRs generally cannot be relied upon to provide accurate counts of completed calls of their own accord; even less could SBRs be relied upon, under the old rule, to make correct compensation payments – or even to show up to pay any compensation at all. When the two problems are objectively compared – the FIXCs' task of obtaining accurate completed call counts cannot be nearly as burdensome as the SBRs' task of extracting accurate compensation payments. The FIXCs begin their task with far more information than PSPs do, and while some of them have offered to transfer information to the PSPs, any realistic implementation of information disclosure cannot possibly compensate for the PSPs' utter lack of leverage in attempting to collect compensation payments, under a SBR-pays system from hundreds of resellers who are likely to hide, go belly-up, or simply prove to be too small to be worth the cost of litigation. By contrast, FIXCs have substantial leverage to ensure through less costly methods – e.g., service agreements,

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advance deposits, and the ability to cut off service for non-payment, that they are adequately protected from loss in a FIXC-pays system. FIXC claims that they lack leverage ignore these fundamental differences between FIXCs and PSPs.

Moreover, the use of IXC clearinghouses does not contribute any leverage to PSPs and thus does not address the fundamental problems of a SBR-pays system. The simple reality, as other PSPs comments illustrate, is that in a SBR-pays system, PSPs would be stuck with a Hobson's choice between giving up most of the compensation owed by SBRs or resuming wide-scale litigation against SBRs, in which the costs and burdens frequently exceed any revenues recovered. Minor modifications of the SBR-pays, such as MCI's self-certification proposal, would be woefully inadequate to control abuses of a SBR-pays system.

The current rule, by contrast, minimizes overall losses and best serves the statutory purpose of ensuring that PSPs are compensated for every call. The rule should be modified to increase IXCs' flexibility in dealing with resellers. It should not be junked based on abstract ill-defined criteria such as "primary economic beneficiary," which has never governed the Commission's final decisions regarding the obligations of FFIXCs and switched-based and switchless resellers. The determination that FIXCs should pay for calls terminated to their SBR customers' platforms is easily distinguishable and wholly consistent with Commission and court decisions that have disapproved certain reallocations of compensation obligations between totally unrelated carriers.

Several FIXCs acknowledge that the kind of reporting requirements suggested by APCC are reasonable, and they should be adopted. Finally, the Commission should summarily reject some carriers' "caller-pays" proposals for the same reasons it has rejected those proposals in the past, time and time again.

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The American Public Communications Council ("APCC") hereby replies to the comments filed in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned docket.[1] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, FCC 03-119 (rel. May 28, 2003) ("*FNPRM*").

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[1] Comments were filed by Association of Communications Enterprises, Focal Communications Corp. and US LEC Corp. ("ASCENT"); AT&T Corp. ("AT&T"); Bulletins ("Bulletins"); Communigroup of K.C., Inc. d/b/a CGI, Communigroup of Jackson, Inc., NTS Communications, Inc., Vartec Telecom, Inc., Transtel Communications, Inc. and Centurytel Long Distance, LLC ("Communigroup"); Global Crossing North America, Inc. ("Global Crossing"); IDT Corporation ("IDT"); Illinois Public Telecommunications Association ("IPTA"); OCMC, Inc. ("OCMC"); Qwest Communications International, Inc. ("Qwest"); RBOC Payphone Coalition ("RBOCs"); Sprint Corporation ("Sprint"); Telstar International, Inc. and the International Prepaid Communications Association, Inc. ("Telstar"); Wiltel Communications, LLC ("Wiltel"); and WorldCom, Inc. ("WorldCom").

I. FIXCs CAN FAIRLY AND LAWFULLY BE REQUIRED TO PAY IN THE FIRST INSTANCE THE COMPENSATION FOR CALLS ROUTED TO SBRs

Many of the first facilities-based interexchange carriers ("FIXCs") and switch-based resellers ("SBRs") share a common objective in this proceeding – to shift back to SBRs the responsibility to pay dial-around compensation ("compensation" or "DAC") for payphone calls that FIXCs terminate on SBR platforms. The FIXCs want to get these calls off their plates, while the SBRs want to return to the days when most SBRs managed to avoid paying any compensation at all. Both groups therefore argue that the SBRs are the only logical or lawful parties on whom to place the DAC payment obligation.

The FIXCs take the position that, regardless of the efficiencies involved, it is unfair and even unlawful to involve FIXCs in compensation for calls handled by SBRs. The FIXCs contend that they should not be held responsible for payment for SBR calls because the SBR is the "principal economic beneficiary;" the FIXCs merely happen to find themselves "stuck in the middle" between payphone service providers ("PSPs") and SBRs, and therefore should not be required to be, in effect, guarantors for SBRs. AT&T, for example, states that the current rules "[foist] regulatory obligations that properly should be shouldered by SBRs onto [F]IXCs" and "[mandate] that [F]IXCs comply with tracking and reporting procedures that can and properly should be borne by SBRs." AT&T at 2. AT&T adds that these payment and tracking obligations "properly" belong to SBRs "because they derive the primary economic benefit from them." *Id.* Therefore, AT&T concludes, under the current rule "[F]IXCs are unfairly deputized to act as the agent of PSPs to obtain this information from SBRs," and "must act as guarantors of payments to PSPs for obligations that properly should be borne by SBRs." AT&T at 4.

This type of rhetoric, which permeates the comments of all the FIXCs who oppose the current rule, mischaracterizes the nature of the payphone compensation process as defined by the statute. The purpose of DAC is *not* to ensure that the "proper" party pays for each call; it is to promote widespread payphone deployment by ensuring that "*payphone service providers are* fairly compensated for each and every completed intrastate and interstate call." 47 U.S.C. § 276(b)(1)(A). The statute says nothing about *who* must do the compensating.

In answering the "who pays" question, therefore, the Commission must be guided by the statutory purpose. In a prior decision,[2] the Commission has made clear that this purpose requires the Commission to err, if at all, on the side of ensuring that PSPs can fully recover their payphone costs. *See Third Report and Order* at ¶ 59.

Therefore, the determination as to whether FIXCs or SBRs should be responsible for compensating PSPs does not require the Commission to select the "primary economic beneficiary" – an ill-defined term that does little or nothing to advance the statutory purpose. Thus, there is no statutory basis for pre-selection among the various carriers that may be involved in handling a payphone call a particular carrier as the one to whom the payment obligation "properly" belongs, it is at most, one of several factors to be considered. Rather, the Commission must assign payment responsibilities so as to

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[2] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) ("*Third Report and Order*"), *affd sub nom. American Public Communications, et al. v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) ("*APCC v. FCC*").

maximize the likelihood that PSPs will be fully and fairly compensated for each and every call using their payphones, as the statute requires.

It is not correct, therefore, for FIXCs to characterize their rule under the current role as "agents" of the PSPs or "guarantors" for the SBRs. The FIXCs are simply the parties to whom compensation responsibility is and should be, assigned by the Commission's rules. *See* also note 17, *infra*.

II. THE FIXCs' PROBLEMS COLLECTING DATA FROM SBRs PALE NEXT TO THE BURDENS IMPOSED ON PSPs BY A SBR-PAYS RULE

The FIXCs' main "practical" argument (as opposed to their theoretical contentions as to the "proper" party) for shifting DAC responsibility back to the SBRs is based on their claimed current difficulties collecting accurate call completion information from SBRs. While the existence of such difficulties cannot be denied (although they may have been exaggerated), the claimed problems cannot be compared to the extreme burdens that PSPs faced and would face again under a SBR-pays rule.

Indeed, the FIXCs' argument is refuted by its own internal inconsistencies. On the one hand, the FIXCs complain about the inaccuracy and untimeliness of SBRs' completed call data. AT&T at 14-16; MCI at 14, 25. On the other hand, the FIXCs urge the Commission to entrust the SBRs with both tracking *and* direct payment responsibility.

The contradiction is glaring. If SBRs are not even providing their own IXC service suppliers, on whom they are dependent for their livelihood, with accurate call data, the Commission cannot possibly expect that SBRs will accurately track calls and pay compensation to PSPs, with whom most SBRs have no business relationship whatever and who must supply the SBRs with their services – whether the SBRs pay or not. While FIXCs may be having some difficulty obtaining accurate counts of completed calls, they are nonetheless able to use their contractual and business relationships with their SBR customers to encourage and require the SBRs to cooperate in the provision of accurate data, and to ensure timely payment of the FIXCs' compensation pass-through charges. PSPs, by contrast, have zero leverage, short of litigation to encourage SBRs to make accurate compensation payments, or any compensation payments at all – and even then the SBRs often retreat behind Chapter 11 or Chapter 7.

Therefore, the lesson to be drawn from the FIXCs' descriptions of their experiences under the new rule is the opposite of what the FIXCs intend. The FIXCs' cure would cause much more harm than their alleged disease. There is no perfect solution; instead, the Commission must choose, among more or less flawed alternatives, the one most likely to ensure that PSPs are fairly compensated for "each and every" completed call using their payphones. Based on that guideline, the Commission's tentative conclusion[3] that tracking and payment responsibility should remain with the FIXC is clearly correct.

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[3] Some parties claim that the Commission's tentative conclusion on this point somehow indicates bias. This is nonsense. Nothing in the Administrative Procedure Act requires the Commission to begin its rulemaking proceedings from a position of total neutrality. Indeed, the very purpose of a notice of proposed rulemaking is to *propose* rules. Such proposals are based on the agency's tentative conclusions about the policy direction that will best serve the public interest. If the Commission failed to disclose to the public its initial views on where the public interest lies, that failure to reveal the agency's thought process would mislead the parties and arguably violate the Administrative Procedure Act. *See* 5 U.S.C.A. § 553(b).

A. FIXCs, Resellers, and PSPs Agree That SBRs Cannot Be Counted on to Track and Pay

Although they disagree on the conclusions to be drawn, parties from all sides of the industry agree on one central fact: SBRs generally cannot be counted on to track and report completed payphone calls accurately on their own.

Many SBRs even acknowledge that they are in a particularly bad position to undertake the tracking of payphone calls and the direct payment of payphone compensation. ASCENT *et al.* at 4. FIXCs agree that SBRs have shown themselves to be inadequate when it comes to tracking calls.

> AT&T, with few exceptions, has been unable to collect adequate call completion data from SBRs to calculate remittances to PSPs.

AT&T at 15.

> [T]he CDRs provided by SBRs – which include information such as the originating ANI, the duration of the call, the terminating phone number, and the FLEX-ANI digits – frequently do not match AT&T's information.

Id. at 16.

> Many smaller SBRs have simply failed to implement [the] longstanding requirement [to accurately track completed payphone calls.]

MCI at 14.

> 88% of MCI's SBRs either do not have call tracking systems in place, or have systems in place that fail to consistently provide [accurate call] completion data in a timely manner.

MCI at 25. Qwest states that 328 of its 355 SBR customers, or more than 92%, have failed to participate in Qwest's completed call true-up process. Qwest at 8.

Although some SBRs dispute some of these claims, the FIXCs' reports are consistent with PSPs' experience under the old rule. As discussed in APCC's initial comments, that experience offered painful proof that SBRs generally could not be relied upon to accurately track or pay for compensable payphone calls. Most SBRs that APCC had to deal with (and continues to have to deal with to clean up outstanding liabilities under the *First Reconsideration Order*) either were unable (or unwilling) to produce payphone call reports, or had no adequate substantiation for the call reports they did produce. FIXCs do not disagree. As MCI's comments succinctly put it: "[M]any SBRs did not comply with [the First Reconsideration Order] requirements." MCI at 5.[4]

B. The Difficulties with SBRs Underscore That to Meet the Statutory Objective for the Compensation System, FIXCs Must Retain Payment Responsibility

A logical and appropriate way to address the problem of SBRs' unreliability is to modify the Commission's current rules to (1) improve the FIXCs' ability to obtain accurate call completion data and/or (2) limit the need for such data by authorizing the FIXCs to pay compensation without precise data on the ultimate completion of calls. The solution is *not* to remove from the compensation scheme the only parties – the FIXCs – from whom PSPs can possibly succeed in collecting close to full compensation for calls routed to SBR platforms.

While devoting great effort to describing their problems adjusting to the current rules, the FIXCs fail to offer any real evidence, or even plausible reasons, to explain why shifting the burden of dealing with resellers back to PSPs would improve the accuracy of SBRs' call counts, increase the efficiency of the compensation process, or achieve the statutory objective.

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4 "[M]any SBRs never invested in the facilities, nor did they develop procedures, to accurately match payphone identifiers . . . with switch records and then transfer them into formats that could be used to meet their payphone compensation responsibilities." MCI at 6.

First, the FIXCs offer to provide PSPs with more information about their SBR customers, contending that this will suffice to enable the PSPs to cost-effectively collect DAC from the SBRs. APCC agrees that this information is important to allow PSPs to verify their payments, and urges the Commission to require that FIXCs provide it. (See Section III below.) Information disclosure, however, cannot compensate for the other major flaws of a SBR-pays system. It is not lack of information alone that crippled PSPs' past efforts to collect DAC from SBRs. The other factors, for which there is no effective remedy in a SBR-pays systems include the PSPs' utter lack of leverage over SBRs and the sheer inefficiency involved in attempting to police transactions between 2,000-plus PSPs and several hundred SBRs. On each of these points, the factual evidence provided by commenters confirms that even with more information disclosure, a SBR-pays systems would be far less effective than the current rule in ensuring that PSPs are fairly compensated for every dial-around call. PSPs would be far less successful than FIXCs in ensuring accurate call counts and accurate DAC.

1. Information Disclosure Requirements Would Not Solve PSPs' Problems Collecting from SBRs

As the FIXCs are forced to agree (*see e.g.*, Global Crossing at 3), PSPs have far less information about SBRs than they would need to pursue collection effectively. While the FIXCs report difficulties getting the information they need from SBRs, they already have much of the information needed, both to determine call counts and to recover their compensation payments from SBRs if they so choose. Before agreeing to take the reseller as a customer, the FIXC is in a position to demand whatever information it needs to ensure that the reseller has a valid billing address, good credit, etc. The PSPs have no such opportunity. The FIXCs offer to correct the PSPs' information deficit by providing disclosure of the identities of their SBR customers, but the PSPs' collection difficulties cannot be so easily overcome. In the past, the FIXCs themselves have been reluctant to disclose information about their SBR customers, and the information disclosed was often unreliable. Moreover, the information that PSPs would need far exceeds that which IXCs have indicated a willingness to provide.

a. FIXCs have a poor record of compliance with information requirements

Under the old rules, the FIXCs' had a very poor track record on providing information on SBRs to PSPs, even when the disclosures were required by the Commission's rules. This is because, under the old rule, as a practical matter, the FIXCs faced no consequences if they failed to disclose information or made incorrect disclosures. APCC Services, Inc.'s experiences, described in APCC's initial comments, are mirrored by those of Bulletins, another PSP clearinghouse:

> First, it took almost two years before any carrier [FIXC] agreed to provide any SBR disclosure at all, and second, any disclosures that were ultimately provided from underlying carriers were either untimely, incomplete, or erroneous.

Bulletins Comments at 4.

When Bulletins finally obtained from WorldCom a list of WorldCom's SBR customers, fewer than 20% replied to Bulletins request for compensation payments -- and most of those replying proved to be end users, not carriers. Despite repeated requests, WorldCom did not correct or supplement the information's deficiencies. *Id.* The information on SBRs that Bulletins received from Sprint was also flawed. Instead of using Bulletins' 800 listing that identified which specific toll free numbers were dialed at Bulletins' payphones, Sprint provided its own unique quarterly listing of the toll-free numbers that lacked listings for the first eight quarters of per-call compensation. *Id.* at

5. Moreover, customers apparently were selected for inclusion on Sprint's list of "SBRs" based on whether the customer generated enough volume to be classified as a wholesale customer. *Id.* at 7-8. Most of those that did acknowledge being resellers still refused to pay, generally claiming that Sprint had already collected a surcharge or had agreed to pay the compensation. As a result, out of 150 customers on the list, fewer than *ten* paid any compensation to Bulletins. *Id.* at 5-6. Global Crossing and Qwest *never* provided Bulletins with usable lists of SBRs even though they too declined to pay for their SBRs' calls. Global Crossing apparently considered only 15-20 percent of its payphone-originated calls to be "retail" calls for which it was required to pay compensation. *Id.* at 6-7. Bulletins' experience is consistent with that of APCC Services, Inc., discussed in APCC's Comments at 5-8.

All of this FIXC obfuscation , confusion , and misinformation makes sense in the context of the reseller market as the FIXCs have themselves described it—a robust, vibrant and viciously competitive free for all. In this environment, the carriers had a race to the bottom in protecting their reseller customers. The competitive pressures that the FIXCs describe — AT&T, MCI, Sprint, and the others — were apparently at work. Whichever FIXC did the best job of shielding its SBR customers from the PSPs would have another arrow in its quiver of competitive tools. Whether wittingly or unwittingly, by design or by apathy and resistance, the FIXCs became the handmaidens and willing accomplices of the SBRs in the latters' at best indifference to and at worst willful attempts to evade and avoid meeting their obligations to PSPs.

b. Even accurate information disclosure would not suffice

Even if FIXCs complied perfectly with their proposed information disclosure requirements, the additional information would not enable PSPs to cost-effectively collect DAC from SBRs.[5] First, the fact that a FIXC has identified one of its customers as liable does not mean that that customer will accept responsibility to pay dial-around compensation to the PSP. See Declaration of Allan C. Hubbard, ¶¶ 6-8 (attached to these reply comments as Exhibit 1).[6] Second, unlike FIXCs, a PSP rarely can obtain early warning that a SBR may be in financial jeopardy and rarely can take steps to protect itself. Third, unlike the FIXC, the PSP does not know whether FLEX ANI is being transmitted to its SBR customer and thus cannot take steps to address any problems with FLEX ANI transmission.[7] But, as discussed below, even full information disclosure would not suffice to make the SBR-pays system work.

2. Unlike PSP, FIXCs Have Leverage to Ensure Accurate Completed Call Reporting

Most FIXCs take the position that the only relevant issue is whether PSPs have sufficient information. As APCC's comments stress, however, information is only one

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[5] In the event that the Commission does reinstitute a SBR pays rule, it should at a minimum require the information disclosures suggested by MCI and Sprint.

[6] Unlike FIXCs, PSPs have no pre-established customer relationship, and therefore no guarantee that the entity they are dealing with is, in fact, the entity liable to pay them. Companies targeted by PSPs for collection of DAC under the old rules frequently could not be located, or if located, frequently claimed that they were liable to pay compensation. *See* Hubbard Dec., ¶¶ 6-8.

[7] There is a conflict among the commenters as to whether FIXCs always pass on FLEX ANI digits to resellers. Moreover, FLEX ANI often fails to be transmitted by the LEC – a fact that is knowable to the FIXC but not the PSP or even the SBR. *See* below.

part of the problem. Far more important is the fact that PSPs, unlike FIXCs, have no significant business relationships with or leverage over their SBR customers.[8]

While a FIXC can choose not to serve a SBR that does not agree to the FIXCs' reasonable conditions, a PSP has no opportunity to refuse service. If a SBR does not provide accurate call information, a FIXC can cut off service, but a PSP has no recourse except litigation.

Some FIXCs claim that they, too, have no leverage over SBRs, and thus are no better situated than PSPs themselves to ensure that PSPs are compensated for every completed call. Some FIXCs argue that it is, rather, the SBRs who have leverage over FIXCs. MCI at 19-21. According to these FIXCs, the wholesale long distance market is so competitive that SBRs will simply move their business to another FIXC if their current FIXC demands too much information about payphone calls. On the other hand, the SBRs deny this, contending that the FIXCs "are using their market dominance in the toll free service market to take advantage of SBRs and recover costs completely unrelated to the per-call compensation of their SBR customers." IDT at 23. The Commission need not answer this question, however. The key fact is not that FIXCs may have market power over SBRs, but that FIXCs *do* have free market relationships with SBRs. Unlike PSPs, FIXCs can agree in advance with SBRs on the terms under which the FIXCs will provide service. This alone is sufficient to give FIXCs far more opportunity to influence the behavior of SBRs.

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[8] Information, in fact, is a form of leverage. Simply by knowing more about their SBR customers than PSPs will ever know, FIXCs are better able to influence SBRs' behavior.

Carriers need not be monopolies or even a dominant oligopoly in order to have more leverage over their customers than PSPs do. It is clearly not the case, as some FIXCs suggest (MCI at 19), that FIXCs lack leverage because they are required by law to provide service to all comers. Although the FIXCs profess uncertainty as to their authority to require cooperation from their SBR customers as a condition of providing service, the current rate reflects that FIXCs indisputably have the right to determine for themselves the reasonable rates and conditions under which they are willing to provide service. RBOC Payphone Coalition at 11-12. The Commission has stated on numerous occasions that carriers may place reasonable restrictions and conditions on their reseller customers. *See e.g., Public Services Enterprises of Pennsylvania v. AT&T Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 8390, 8398, ¶ 19; *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 F.C.C.2d 261, 264, ¶ 4 (1976).

For example, in *GE Capital Communications Services Corporation v. AT&T Corporation*, Memorandum Opinion and Order, 13 FCC Rcd 13138 (1998), a reseller requested that AT&T provide it with two types of tariffed services over a single customer line. One type of service was interstate in nature and the other was intrastate in nature. AT&T refused to offer both services over a single line because each of the services had a different PIC code and carrying both services over a single PIC code would "require substantial and burdensome redesign of major portions of AT&T's network." *Id.* at 13146, ¶ 17. The Commission concluded that AT&T's restriction was valid, explaining that "AT&T has offered a valid business justification for refusing to reconfigure its CT 383 service in accordance with [the reseller's] request . . . we find no violation of the Commission's resale policies." *Id.* 13148, ¶ 21. Just as the Commission found that AT&T had a valid business reason for imposing its resale restriction in GE Capital, it may find that FIXCs have a valid reason to require *accurate* tracking data from the SBR as a condition of resale. (And the Commission has already held that the IXCs can recover from SBRs the costs of tracking and administering the dial-around compensation scheme.)

Ultimately, the FIXC has the choice to serve or not to serve a SBR that is not willing to agree to the FIXC's reasonable conditions. Having made the provision of certain completed call information a condition of providing service or of exempting SBRs from the FIXC's payphone surcharges, the FIXC has every right to terminate service to a SBR that refuses to provide the information or pay the surcharge, just as it would terminate service to any other customer that refused to pay its bill or comply with the conditions of service.

It is possible that an FIXC that enforces its service agreements with SBRs may lose some business to a less scrupulous FIXC, or to an FIXC with lower administrative costs.[9] But that is a marketplace result with which the Commission need not interfere. FIXCs that want to serve the SBR market must accept the market conditions that come with it, including the regulation requiring FIXCs to track and pay for payphone-originated calls.[10]

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9 Moreover, if less scrupulous FIXCs are able to take substantial market share away from honest FIXCs by allowing SBRs to report artificially low call counts, it is a sure bet that PSPs will begin aggressive collection actions against those FIXCs.

10 FIXCs can also deal more easily than PSPs with those situations in which there is a "chain" of two or more switch-based resellers. While the PSP must itself figure out how to identify and collect compensation from the last reseller in the chain, the FIXC can still collect its compensation recovery from its direct SBR customer, letting that customer take responsibility for obtaining payment and any necessary call completion

In sum, the mere fact that the FIXC and its customers must agree to certain terms of service in advance of the FIXC providing service means that the FIXC has far more leverage than PSPs, who must provide service to FIXCs and SBRs without any advance agreement on terms.

3. In a SBR-Pays System, PSPs Have No Ability at All to Protect Themselves from Non-paying SBRs

In a FIXC-pays systems, PSPs will be compensated for a higher percentage of calls simply by virtue of dealing with fewer carriers. In the SBR-pays system, PSPs could do little or nothing, short of litigation, to protect themselves from bankrupt or "deadbeat" SBRs. First, unlike FIXCs, PSPs had no ability to cut off service to nonpaying SBRs. APCC at 12. Second, PSPs have no ability to protect themselves from SBRs who are at risk of bankruptcy or who default on their payments, by demanding up-front deposits, surety bonds, and the like. Third, because PSPs currently must await a quarterly billing cycle which itself is a full quarter in arrears, PSPs are unable to obtain early warnings, such as slow pay, when a SBR is approaching financial disruption. A FIXC-pays system largely relieves PSPs from the major losses they incurred when SBRs would "hide" to avoid payment, or go belly-up, or prove to be not worth the cost of pursuing.

Sprint and others argue that, by shifting payment responsibility to FIXCs, the Commission has merely shifted the same issues of loss from PSPs to FIXCs. Sprint

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information from the next SBR customer in the chain. Since each link in the chain is a supplier-customer relationship, the transactions and information gathering all take place in the context of established relationships in which the parties' responsibilities have been determined at the outset.

claims that it failed to recover a total of 69% of its payphone surcharges billed to SBRs, due to SBR bankruptcies (23%) and disputes over Sprint's right to collect a payphone surcharge. Sprint at 12. But Sprint does not disclose the accounting methods by which the alleged bad debt was calculated, and neither its estimates nor those of other carriers can be accepted. For example, were non-payments allocated evenly to both the payphone surcharges, which MCI says represents about 2% of its billings to SBRs (MCI at 21) and to the other charges on the unpaid bills?[11]

To the extent that IXCs have incurred increased losses, they almost certainly reflect the natural transitional problems that arise when FIXCs finally begin collecting payphone surcharges from SBRs who have largely avoided their payment responsibility for so many years. Overall, however, the FIXCs clearly can protect themselves from loss far more effectively than PSPs, due to their ability to cut off service for non-payment and to demand up-front deposits, as well as the monthly billing cycle, which acts as a much more effective early-warning systems than the quarterly system for compensating PSP. In summary while FIXCS may face some risks of non-recovery of their compensation payments under the current rule, they are much better equipped than PSPs to take steps to minimize those losses.

With respect to non-payment generally, the FIXCs clearly can protect themselves much more effectively than PSPs, due to their ability to cut off service for non-payment and to demand up-front deposits, as well as the monthly billing cycle, which acts as a

[11] If a SBR owes $100.00 of which $98.08 is for minutes and $1.92 is for payphone surcharges, and the SBR pays $98.08, does Sprint say it collected 100% of the long distance charges and 0% of the payphone surcharges, or that it collected 98.08% of all charges?

much more effective early-warning system than the quarterly compensation system. Therefore, the losses suffered by FIXCs under the current rule are undoubtedly far less than those suffered by PSPs under the old rule. And further, to the extent that FIXCs' losses from bad debt and/or payment disputes have increased as a consequence of the new rule, such an increase, which is likely transitional.[12]

Some SBRs argue that PSP losses under the old rule were not that great after all. They point to the recent bankruptcies of MCI and Global Crossing, and suggest that PSPs' losses from FIXC bankruptcies must be greater than their losses from SBR bankruptcies. *See, e.g., Id. at 8-9.* The comparison, of course, is invidious, given that the only losses from FIXCs' bankruptcies that were affected by the change from a SBR-pays to a FIXC-pays rule were the payments that the FIXCs would have made on calls routed to SBRs. Furthermore, while the FIXC bankruptcies interrupted payments for one or two quarters, the problem of non-payment by SBRs, due to bankruptcy, avoidance, or any other problem, is a chronic problem that caused losses *every* single quarter under the old rule. Additionally, the SBRs that go bankrupt frequently do so after PSPs catch up with them and extract a large back payment.

As explained in APCC's initial comments, in several cases this has resulted in the bankruptcy trustee suing PSPs for a refund of the back payment, on the grounds that it

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12 The Commission may soon have another issue to address which may or may not turn out to be "transitional." As reply comments in this proceeding were being prepared, some of the carrier per call dial around payments (due on the first of July) for the first quarter of 2003 began to arrive. It appears that many or most of the major FIXCs have all simultaneously executed a "take back-true up", allegedly based on actual call completion data submitted by each FIXC'S respective SBRs, for all of the six quarters that the current rule has been in effect. The net effect has apparently been a dramatic reduction in DAC payments for the quarter. Data is still being compiled

was not made in the ordinary course of business. This problem arises with SBRs who have been chronic payment avoiders, and is extremely unlikely to occur with major FIXCs. Finally, the comparison takes no account of the exorbitant costs of collection from SBRs.

C. Duplication of Costs

Contrary to the claims of several parties, placing payment responsibility on the FIXCs would involve relatively minimal duplication of costs, compared to the duplication involved in a SBR-pays system. Under either approach, FIXCs will remain central participants in the DAC process, and will continue to incur the costs of such participation. The FIXCs already have call tracking and payment systems in place, and more than five years' experience running those systems. Obviously, FIXCs must continue to maintain their call tracking systems in any event, in order to track and pay for their calls that are completed to their own end users and to switchless resellers. Furthermore, even under the system preferred by most FIXCs and SBRs, FIXCs would continue to track calls and pay compensation on behalf of those SBRs that do not want to track completed calls. It is only for the SBRs that want to track completed calls themselves, that FIXCs would be relieved of a portion of the tracking burden. But even with respect to those SBRs, FIXCs would have to continue tracking calls to the extent necessary to provide information needed by PSPs to ease their collection burden.

Moreover, FIXCs will have to perform a number of other tasks to ensure that they have enabled SBRs to track compensation and have enabled PSPs to collect compensation for the excluded calls. Even in a "SBR-pays" system, for example, FIXCs must (1) subscribe to FLEX ANI to ensure that both the FIXC and its SBR customers can identify payphone calls; (2) provide payphone call-tracking service to those SBRs that wish to use it;[13] and (3) provide information to PSPs to enable them to distinguish the calls for which FIXCs are and are not responsible, to find the SBRs that have payment responsibility, and to collect the correct amount of compensation from those SBRs.

In sum, the FIXCs would, even under a system where SBR pays, still have to perform many of the same functions as they do under the current system. It is not logical to have the SBRs replicate the ability to perform many of these same tasks.

D. Returning to the Old Rule Would Result in Extensive Undercompensation of PSPs

The FIXCs improbably claim that it would be feasible to return to the old rule, with minor modifications. Some of the SBRs also claim that they have "got religion" and are ready to be responsible direct-paying participants in the compensation system. But in light of the problems encountered by PSPs under the old rule and the problems that FIXCs admit they are having with resellers under the new rules, these claims ring exceedingly hollow.

1. SBRs Are Not Able or Willing to Take On Additional Tracking and Payment Responsibilities in the Dial-Around System

If the Commission returned to the old rule, the role of SBRs would expand greatly. Instead of simply providing call completion information to their FIXC service supplier, SBRs would also be responsible for tracking payphone calls in the first place,

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[13] Some portion of SBRs may prefer to pay compensation themselves, but contract out as much of the call tracking as possible to their FIXC. For example, it may turn out to be relatively more efficient for the FIXC to send CDRs that identify payphone-originated calls, and for the SBR to use that information to create a pool of payphone-originated calls, before segregating out the uncompleted calls.

for providing payment to and fielding payment disputes from about 2,000 PSPs with whom the SBRs have no relationship.

Telstar and IPCA improbably assert that shifting direct payment responsibility back to the SBRs would be *more* efficient than leaving the payment responsibility with FIXCs. These parties allege that FIXCs add nothing to the compensation process other than centralization of payments – a function that is performed in any case by IXC clearinghouses. Telstar at 9-10. As discussed above, however, placing payment responsibility with FIXCs accomplishes several other things besides centralizing payments. It places responsibility for recovering compensation from resellers with the entity that has the necessary *information* and the *leverage* to ensure effective collection from SBRs, the most difficult link in the compensation chain. As explained in APCC's initial comments, these functions cannot be duplicated by IXC clearinghouses, because clearinghouses have no means of ensuring the accuracy of the call data provided by payers and can do nothing to induce payment by reluctant payers. APCC at 18-21. Moreover, placing direct payment responsibility on FIXCs centralizes the process of resolving PSPs' disputes over compensation payments –another function that clearinghouses do not perform.

Telstar's implicit argument that IXC clearinghouses are somehow able to perform the same centralized functions as FIXCs is concretely refuted by one of the examples discussed in APCC's initial comments, which highlights the inability of IXC clearinghouses to ensure correct payment. APCC at 7; Declaration of Ruth Jaeger (attached to APCC's comments as Exhibit 2), ¶¶ 22-24. In that example, a SBR who was compensating APCC through a clearinghouse was found to have paid the 1,000-plus PSPs represented by APCC Services a total of $550.00 over a period of seven quarters.

Ultimately, as a result of pressure by APCC Services, the SBR admitted a liability of $50,000 – 100 times the original payment. This case, of which Telstar was aware, dramatically illustrates that, despite Telstar's suggestion to the contrary, the presence of an IXC clearinghouse does not enhance the integrity of the compensation process or improve the honesty of the payers.

In their comments, the FIXCs effectively concede that these types of responsibilities have proven to be too much for the vast majority of average SBRs. In fact, according to the FIXCs, most SBRs are not even up to the task of providing call completion information to their own service supplier. FIXCs report that 40 to 50 percent of SBRs have opted to pay the FIXC's payphone surcharge rather than accept the responsibility of providing call completion information. MCI at 24 and AT&T at 10. Moreover, MCI estimates that an additional 39 percent of its SBR customers who have *not* agreed to pay MCI's payphone surcharge are nevertheless incapable or unwilling to provide accurate and timely call completion information. MCI at 24. Since it is clearly far more difficult for a SBR to accurately track payphone calls and pay compensation for 2,000 PSPs than to provide call completion information to one's supplier regarding supplier-identified payphone calls, the rate of non-compliance undoubtedly would be far higher under a reconstituted "old rule" than under the current rule.

MCI tries to explain away the acknowledged massive non-compliance under the old rule as the result of various temporary, fortuitous circumstances, such as the Commission's failure to enforce its audit requirement, FIXCs' failure to provide adequate information to PSPs regarding their SBR customers, SBRs' confusion about the rule's meaning, and confusion about whether a SBR is switched or switchless. MCI at 6-11. But given MCI's own complaints about SBRs' *current* behavior, these explanations cannot hold water. A more probable explanation is that SBRs simply lack the resources, as well as the incentive, to make an investment in payphone call tracking systems with any confidence that they can recover their costs.

2. Other Problems Would Resurface

Additional problems would resurface if the Commission returns to the old rule. As MCI admits, under the old rule PSPs had a great deal of difficulty in distinguishing switch-based from "switchless" resellers. MCI suggests that this problem resulted from resellers failing to understand how MCI defined "SBR". MCI also implies that the confusion is easily dispelled, but this is unlikely. If the old rule were restored, the same sort of confusion would be generated anew, unless the Commission could craft airtight language removing any doubt as to the procedure for identifying SBRs.[14]

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[14] While not directly relevant to the FNPRM, several commenters discuss the old rule regarding the division of responsibility between FIXCs and SBRs that was in place for the pre-November 23, 2001 period. MCI's description of its reseller customers with both switched and switchless operations and the resulting confusion about whether MCI or its SBRs was responsible for per call compensation serves to underscore that the only tenable interpretation of the old rule is that responsibility shifted from the FIXC if and only if the SBR identified itself to the FIXC as assuming responsibility for paying per call compensation. By imposing liability on the FIXC unless an SBR affirmatively identified itself as responsible, the old rule forced the FIXC to come to some agreement with its resellers about whether they were switch-based--in whole or in part--and, if so, whether they were assuming responsibility for per call compensation and the extent to which they were doing so. Only by doing so could an FIXC shift responsibility for per call payment and thus it had an incentive to address the issue of whether some or all of a reseller's operations were or were not switch-based. By contrast, under the view of the old rule urged by several FIXCs, under which the SBR was always responsible for paying per call compensation, the FIXC would have no incentive to sort out the facts. Instead, it was in the FIXC's self-interest to simply assume that all of its resellers' operations were switch-based, thereby shifting responsibility to the resellers. Moreover, this incentive existed regardless of the nature of a reseller's operations. The

Also likely to resurface is the problem of FLEX ANI failure, which is exacerbated when SBRs are given payment responsibility. First, if it is not clear how many SBRs currently receive FLEX ANI even when it is transmitted by the LEC. While MCI claims that it always passed FLEX ANI or other payphone identifiers to its SBR customers (MCI at 12), SBRs deny that they always receive payphone coding digits from FIXCs (ASCENT et al. at 4). Further, as MCI acknowledges, FLEX ANI is not always transmitted by the LEC. When it fails, the FIXC, who orders the FLEX ANI service and is responsible for testing its reliability (*see Coding Digit Waiver Order* at ¶ 37), is much better situated than the SBR to adjust call counts and take other appropriate responses.

3. PSPs Would Face a Hobson's Choice Between Giving Up the Compensation Owed by SBRs and Resuming Wide-Scale Litigation in Which Costs Frequently Exceed the Revenues Recovered

But the biggest problem of all would be the need for PSPs to resume wide-scale litigation against the numberless resellers who either refuse to pay at all, or who can't or won't track calls accurately, but refuse to admit it in order to avoid paying a payphone surcharge. Under the old rules, before the Commission alone (not counting court actions), APCC Services and allied PSPs have filed ten formal complaints and more than fifty informal complaints against SBRs. Hubbard Dec., ¶ 8. Several of those complaints are still pending at the Commission. As initially discussed in APCC's comments, litigating to collect compensation from SBRs has proven to be extremely expensive, difficult and laborious. *See* also Hubbard Dec.

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result is the confusion that MCI has identified not just with respect to resellers who had both switched and switchless operations but with respect to all resellers.

One of the biggest difficulties has been determining which non-paying SBRs to sue. While there are literally hundreds of such SBRs throughout the country, it is necessary for PSPs to target those SBRs that justify the expense of using the Commission's complaint process as a collection mechanism. To warrant the expense of filing and prosecuting a complaint a target SBR should both (1) owe substantial DAC and (2) have the financial resources to pay their DAC obligation. Cost efficiency in pursuing SBRs before the Commission has been particularly important to claimant PSPs because the Commission's processes do not provide for recovery of attorneys' fees or costs. *Id.*, ¶ 6.

Yet there is often very little reliable information as to these critical factors. Moreover, a meaningful review of the information that is available is itself time consuming and expensive. As a result, where defendant SBRs have failed even to respond to Commission notices of complaints, it is often necessary to conclude that there is insufficient information to justify incurring the costs of further pursuit. In other cases, SBRs have been pursued but have turned out to be on the verge of bankruptcy. Only about one in five of the complaints filed to date have resulted (or are expected to result) in the collection of DAC. *Id.*

Further, there is no practical way for PSPs to verify the completed call counts asserted by SBRs. In general, there is no data available, and the call data provided by FIXCs has been incomplete and unreliable. In an unusual instance, detailed call data recently became available for Global Crossing's SBRs. A review of the Global Crossing data revealed that, of the five Global Crossing SBRs with which PSP claimants reached settlements, four appear to have based their settlements on call completion ratios of between approximately five and fifteen percent of the payphone originated calls. Only the fifth utilized a call completion ratio that was at all close to the industry average of well over 50%. *Id.*, ¶ 10.

Of the four SBRs that entered settlement agreements with Claimant PSPs that allowed payments to be made over time, three consistently failed to make timely payments after the initial payment. Subsequent payments were only extracted after issuance of default letters or the initiation of additional legal action. *Id.*, ¶ 11.

Another difficulty has been the disparate views of FIXCs and their reseller customers as to who is responsible for paying dial-around compensation. For defendant SBRs of FIXCs, the response to complaints often was that the SBR's FIXC was responsible for payment of DAC. In one case, the defendant SBR even asserted that it had contractually delegated any responsibility it had for payment of DAC to its switchless reseller customers. *Id.*, ¶ 12. In only two instances, involving smaller FIXCs, has the process been straightforward: Global Crossing or Cable & Wireless. Those two carriers provided: (1) a list of their SBRs that had signed agreements in which the SBR explicitly acknowledged responsibility for payment of DAC and (2) copies of the relevant agreements.

In many instances, there have been difficulties with correlating an SBR's name and address as provided by a FIXC with the legal name and address of the SBR, the SBR's name is confusingly similar to the names of other entities or the SBR named by the FIXC has merged with or sold its assets to another entity. *Id.*, ¶ 7.

SBRs also have chronically failed to file and update the service of process information with the Chief of the Enforcement Bureau's Market Disputes Resolution Division as required by Section 1.47(h) of the Commission's Rules, which exacerbates the process of identifying the correct SBR. Of the more than 50 SBRs against which PSP

Claimants have filed complaints, only nine had even initially complied with the requirements of Section 1.47(h) and of those nine only six had information that was current. Moreover, of the 50 members of the International Prepaid Communications Association, listed on the Association's website, many of which presumably are carriers, only the major IXC and RBOC members and two SBRs had complied with section 1.47(h) of the rules. *Id.*, ¶ 8.

Under the old rule, claimant PSPs were almost entirely dependent on FIXCs to provide accurate lists of their SBRs that were responsible for payment of DAC. Yet, the information provided by the FIXCs was often unreliable. In several instances, SBRs operated simultaneously as a switch-based and a switchless reseller. This gave rise to the foreseeable ambiguities as to whether the reseller was responsible for paying compensation on all its calls, none of its calls, or only those carried as a switch-based reseller. MCI acknowledges that this problem exists, but believes it can be solved by requiring SBRs to differentiate among the two modes of operation. In APCC's experience, however, it was difficult for the SBRs that APCC pursued to segregate the calls they carried on a SBR basis from those carried as a switchless reseller. *Id.*, ¶ 13.

For all these reasons, trying to collect compensation from SBRs proved to be almost impossibly difficult, expensive, and burdensome for PSPs. A number of SBRs have commented that, under the current rule, contrary to the Commission's apparent expectations, there have been very few agreements between PSPs and SBRs. From the PSP's perspective, the reason is very simple: Their experience with SBRs under the old rule was almost entirely negative. As discussed above, even when PSPs reached agreements with SBRs for specific compensation payment schedule to settle past liability, most of the SBRs failed to adhere to their agreements without further threats or litigation. It is no wonder that PSPs have little interest in pursuing agreements with SBRs under the current rule.

4. The Proposed Modifications Would Not Be Sufficient to Offset the Inherent Deficiencies of a SBR-Pays Rule

MCI also proposes, as an alternative to making FIXCs responsible for the payphone compensation of their SBRs, that the Commission should enforce its rules that currently require SBRs to have an independent third-party certify that the SBR's compensation system reliably tracks completed payphone calls. In the event that the SBR so certifies, the SBR would be allowed to directly compensate the PSPs and the FIXC would no longer be responsible for the payphone compensation of that SBR. WorldCom Comments at 27. This proposal should be rejected by the Commission for three reasons.

First, MCI offers no suggestion as to what type of third party would be actually qualified to audit SBRs to verify that their compensation system is, *in fact*, reliable. Second, given MCI's claim that, despite MCI's own contract requirements, SBRs have failed "to implement systems capable of delivering accurate and timely call completion data" (*Id.*), there is no reason to believe that an independent third party would be successful in policing the data provided by the SBRs. In fact, intuitively the opposite is true, since the FIXC is better situated to verify the accuracy of the SBR's information and has a strong interest in doing so given the FIXC's responsibility for making accurate compensation payments under the current rules. Finally, WorldCom offers no suggestion as to what the Commission should do if the third-party verification is unreliable or untrue. What enforcement mechanisms would the Commission implement and what remedies would the PSPs have at that point? Would the auditor be liable for the lost compensation? Are the auditors subject to Commission jurisdiction so they can be held to account under the Commission's rules? Could the SBR be sanctioned for what will inevitably be asserted as "auditor error?" These fundamental shortcomings and unanswered questions are fatal to WorldCom's proposal.

E. None of the Authorities Relied Upon By FIXCs and SBRs Prevent the Commission from Requiring FIXCs to Pay in the First Instance for Calls Routed to SBRs

The FIXCs take the position that, regardless of the efficiencies involved, it is unfair and even unlawful to involve FIXCs in compensation for calls handled by SBRs. The FIXCs contend that they should not be held responsible for payment for SBR calls because the SBR is the "principal economic beneficiary;" the FIXCs merely happen to find themselves "stuck in the middle" between PSPs and SBRs, and therefore should not be required to be, in effect, guarantors for SBRs.

This is a gross distortion of the role of FIXCs in handling payphone calls. Since FIXCs claim that they compete vigorously for the business of switch-based resellers ("SBRs"), FIXCs must know the nature of the SBRs' business. For example, they must be aware that SBRs with calling card platforms, and particularly SBRs with debit card platforms, rely heavily on payphones to enable their cardholders to access their platforms. FIXCs that actively seek to gain SBRs as customers can hardly claim ignorance of these facts. If a FIXC is willing to go after a group of customers that rely on payphones, and provides the connection that links payphones to calling card and debit card platforms, the FIXC can hardly be said to be a mere bystander in the payphone compensation process. The FIXCs have vigorously thrust themselves into the market to compete for SBR business, and it rings hollow for them to assert that they are victims of pursuing their own economic interests. The Commission should not allow the FIXCs to use competitive pressures as an excuse to opt out of their responsibilities.

1. Neither the Statute Nor the Commission's Past Decisions Mandate That Only the "Primary Economic Beneficiary" May Be Required to Pay Compensation

Moreover, even if FIXCs are not the "primary economic beneficiaries" of payphone-originated calls, the statute does not mandate that only the "primary economic beneficiary" may be required to pay compensation. The statute requires that PSPs be "fairly compensated" for every call, but does not say who should do the compensating. And while the Commission used the "primary economic beneficiary" principle as a justification for requiring IXCs, as opposed to LECs or payphone callers, to be the compensation payers, it never rigidly applied that principle in order to identify the particular IXC that should pay. Indeed, the Commission specifically chose to exempt at least some resellers from the direct compensation obligation "in the interests of administrative efficiency and lower costs," even while appearing to acknowledge that resellers might be the primary economic beneficiaries for the calls they handled:

> Although we have concluded that the primary economic beneficiary of payphone calls should bear the burden of paying compensation for these calls, we conclude that, in the interests of administrative efficiency and lower costs, facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers.

First Payphone Order, ¶ 86.

Thus, there is no rule, in the statute or in the Commission's prior decisions, requiring that only the "primary economic beneficiary" (assuming that the term could be adequately defined) may be held responsible for paying dial-around compensation.

In fact, in deciding who pays the Commission has given as much or more weight to considerations of efficiency, cost, and avoiding undue burden on any party.[15] As shown above and in APCC's initial comments, from the perspective of efficiency, cost and burden, and from the perspective of ensuring that PSPs are compensated for every call, it is beyond dispute that the FIXCs are the logical candidates to bear compensation payment responsibility for SBR calls.

2. The *IPTA* Decision Is Inapposite Here

In a further misapplication of the principle of the "primary economic beneficiary," some FIXCs argue that the rules adopted in the *Second Order on Reconsideration* cannot be reconciled with the Act, *citing to Illinois Pub. Telecom. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997)("Illinois Pub. Telecom").* AT&T argues that "the Commission cannot require one sector of the payphone industry to pay for calls when another sector receives their economic benefit, even if transferring this economic benefit

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15 See, e.g., *First Payphone Order,* ¶¶ 83 ("We conclude that the "carrier-pays" system for per-call compensation places the payment obligation on the primary economic beneficiary *in the least burdensome, most cost effective manner.* . . . the carrier-pays system *also gives IXCs the most flexibility to recover their own costs"),* 84 ("[a set use fee system] would lead to far greater transaction costs than through the carrier-pays system"), 85 ("[a caller pays system] 'would appear to unduly burden many transient payphone callers'")(*quoting Notice of Proposed Rulemaking,* ¶ 27); *First Reconsideration Order,* ¶¶ 88 ("We believe that the IXC can best pass on, in the most cost effective manner, any charges for compensable calls to the appropriate customer . . . . it would be burdensome and increase transaction costs to impose a compensation approach that would require callers to acquire coins to make such calls. We conclude further that the ability to make coinless calls from payphones is a convenience that transient callers value"), 89-90 (adducing further reasons for rejecting coin deposits and set use fees based on carrier flexibility, burden on callers, and congressional intent).

would, in the Commission's view, be administratively convenient." *See e.g.*, Comments of AT&T Corp. at 17.

IPTA, however, is inapposite to this proceeding. In *IPTA*, the D.C. Circuit found it arbitrary and capricious for the Commission to require payments under its interim rule *exclusively* from large IXCs – those with over $100 million in toll revenues – while excluding smaller carriers. Citing administrative convenience, the Commission exempted smaller carriers from paying a flat-rate although these carriers actually carried dial-around calls. In this context, the D.C. Circuit rejected the Commission's appeals because smaller carriers were being unfairly excused from their compensation responsibility. As stated by the Court, "[a]dministrative convenience cannot possibly justify an interim plan that exempts all but large IXCs from paying for the costs of services received." *IPTA* at 565. Clearly, this is a different scenario, than the compensation scheme decided in the *Second Order on Reconsideration*. Here, switch-based resellers would not avoid paying for dial-around compensation payments. In actual practice, the FIXC recovers its compensation, plus administrative costs, from the SBR. Moreover, the *Second Order on Reconsideration* specifically provides that "the underlying facilities-based carrier may then obtain reimbursement of the compensation from the switchless or switch-based reseller." *Second Order on Reconsideration* at ¶ 11. Accordingly, in this context, *IPTA* is inapposite.

3. The *Fifth Order On Reconsideration* Does Not Preclude the Commission from Requiring FIXCs to Pay for Calls That They Terminate With SBRs

In similar fashion, some IXCs cite the Commission's *Fifth Order on Reconsideration* to support the assertion that the "Commission itself has acknowledged that it would be unlawful to require one carrier to shoulder obligations that properly should be borne by another." *See e.g.*, Comments of AT&T Corp. at 18. Again, these IXCs overlook the context in which the cited decision was made. In the *Fifth Order on Reconsideration,* the Commission, in ordering a refund, rejected APCC's argument that, because independent PSPs were unable to collect the full amount of compensation due to them, they should not be required to refund payments in excess of the subsequently prescribed rate. The Commission reasoned that carriers who paid their compensation obligations would be unfairly penalized if they were deprived of refunds to make up for the failure of other carriers to pay their share. That decision is consistent with *IPTA* but can be distinguished from the instant situation on the same ground that *IPTA* is distinguishable.

Here the Commission is creating, and there exists, a vehicle for the FIXCs to recover directly from SBRs any money paid out for SBRs. In the *Fifth Order on Reconsideration* situation, there was no relationship between the carriers who would be deprived of refunds and those who had failed to pay. The Commission reasoned that denying refunds, would in essence, unfairly make the IXCs who overpaid compensate for carriers who did not pay at all. Under the *Second Order on Reconsideration,* by contrast, FIXCs have the option to pass-through their compensation payments to their SBR customers, and they exercise that option. *Second Order on Reconsideration* at ¶ 11. Thus, even though SBRs are not required to pay directly, they pay the compensation indirectly. As a practical matter, SBRs are *not* exempted from the compensation obligation.

The *Fifth Order on Reconsideration* can also be distinguished from the rules promulgated in the *Second Order on Reconsideration* on the additional ground that the refunds scenario in the *Fifth Order on Reconsideration* was a retroactive adjustment to a scheme already in place. In the instant case, the rules as implemented in the *Second Order on Reconsideration* are applied on a purely prospective basis. When making rules prospectively, as long as its decision is well reasoned, the Commission is not required to maintain what parties may have come to regard as their rightful "share" of compensation payments.[16]

4. The *APCC* Decision Allows the Commission to Impose Payment Responsibility on IXCs in the First Instance

Additionally, some FIXCs pluck language from *APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) to mistakenly argue that PSPs who cannot collect payments from switch-based resellers must "pursue remedies directly against the delinquent payor, not . . . impose those costs on IXCs." *See e.g.*, Comments of AT&T Corp. at 19. The FIXCs argue that the Commission cannot change the party responsible for paying DAC without violating the Court's mandate.

In *APCC* the court upheld the Commission's decision declining to include in the per call rate an element for the PSPs inability to collect "bad debt." The Court stressed that because of "insufficient information, the Commission found 'that it would be unwise to establish a cost element for bad debt at this time.'" *APCC v. FCC* at 55-56. The purely "evidentiary basis" on which the Commission made its decision was further underscored by the Court's insistence that the Commission "could have formulated some best guess figure for bad debt, but we [the Court] cannot require an agency to enter precise predictive judgments..." *Id.*

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16 Significantly, even in the *Fifth Order on Reconsideration*, the Commission did not consider itself bound to include resellers in all payments for all periods. *See Fifth Order on Reconsideration* at ¶ 60.

Some IXCs focus on what may be considered dicta of the opinion in which the Court states "[f]urthermore, for any harm that may be done to the PSPs, they are not left without remedy." *Id.* at 56 These IXCs posit that this language means that PSPs must pursue remedies against the "delinquent payors" under the Commission's rules.[17] The FIXCs state that "PSPs 'are not left without remedy' for non-payment, and they should use those remedies rather than simply shift the collection problem to someone else." Comments of AT&T Corp. at 19, quoting *APCC*, 215 F. 3d at 56.

But nothing in the court's opinion or in the language quoted above in any way implied, as some IXCs currently argue, that the *only* remedy available to PSPs is to litigate with the "delinquent carrier." On the contrary. Immediately following this statement the Court noted that after the Commission was

> "'unable to generate a sufficient record on this question for issuing this Order,' the FCC invited the parties to file petitions for clarification on the bad debt issue. [Citation Omitted.] The RBOC

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[17] It is important to note that implicit in this and similar FIXC arguments is the notion – which appears repeatedly in many IXCs' comments -- that FIXCs should not be "placed in the middle" of tracking and payment responsibility between SBRs and PSPs, or be forced to act as a "clearinghouse" between these parties, or as "guarantor." As discussed above, however, (*see* Section I, *supra*) these IXCs are confused about the real issue before the Commission. The *Second Order on Reconsideration* made FIXCs *the* responsible *and* liable party to track and make payments directly to the PSPs; the FIXCs are not mere "payment agents" or "disbursement agents." The Commission has made clear that it is the FIXCs, not the SBRs, that are the parties who owe the PSPs for per-call compensation. Thus, the only "delinquent payor" under the *Second Order on Reconsideration* is the FIXC, since it is the FIXC that is responsible to pay. If the FIXC wishes to pursue reimbursement from the SBRs, the *Second Order on Reconsideration* at ¶ 11, specifically allows for it, stating, "the underlying facilities-based carrier may then obtain reimbursement of the compensation from the switchless or switch-based reseller." Accordingly, the IXCs notion that the FIXCs are mere third parties to the SBR payment obligations is entirely off the mark.

> Coalition has made such a filing; the Commission has received that petition; sought and received comments; and is considering the issue."

Id.

Thus the court explicitly contemplated that the Commission *could* shift payment responsibilities. And it is precisely the RBOC Petition that led to the adoption of the rules promulgated in the *Second Order on Reconsideration* that placed on the FIXC's responsibility for paying compensation for their SBRs.

In short, *APCC v. FCC* not only fails to *restrict* the Commission's options in shifting payment responsibility, but also *supports* the very action taken in the *Second Order on Reconsideration* to relieve the burden of bad debt on PSPs. Further, as discussed above, FIXCs are much better situated to protect themselves and minimize the amount of compensation that goes unrecovered from resellers. Therefore, it is reasonable to allocate to them the responsibility for payment in the first instance.[18]

5. The Commission Should Err on the Side of Ensuring Full Compensation of PSPs

Some parties argue that the current rule results in overcompensation of PSPs, because some FIXCs who do not receive adequate call completion data from SBRs are allegedly paying PSPs for each call terminated to the SBR's platform. First, it is not

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[18] If the Commission had found it appropriate to allocate the risk of failing to collect compensation solely to the PSPs, it would have adopted the "set use fee" system in which carriers act purely as billing agents to collect the fee from the end user. The Commission concluded that such a system would impose too many transaction costs, and therefore adopted a system in which carriers pay the compensation and are not required to recover the payment in any particular manner. Since the rule does not require the carrier to recover the compensation payment in a particular manner, neither should it guarantee the carrier the ability to recover the compensation payment in a particular manner.

certain that there is any net "overcompensation." While PSPs may be compensated for a certain number of calls that are not completed to end users, the FIXC practice of paying PSPs for each call terminated to the SBR's platform also undercompensates PSPs when a caller accesses the platform once and then places multiple calls. There is no way to know whether the net result of these two effects is "overcompensation" or "undercompensation."

Second, assuming there is some compensation of PSPs for uncompleted calls, it is not clear why that compensation should be defined as "overcompensation." Even uncompleted calls make use of the payphone, and while the statute mandates compensation for completed calls, it does not prohibit compensation of PSPs for uncompleted calls.

Third, any extra compensation that results under the FIXC-pays rule is permissible in any event, in light of the statutory purpose to promote widespread payphone deployment and ensure that *PSPs* are fairly compensated for every call. In an earlier decision, the Commission made clear that these purposes require it to err, if at all, on the side of ensuring that PSPs can fully recover their payphone costs. *Third Report and Order* at ¶ 59, *aff'd sub nom. APCC v. FCC,* 215 F. 3d 51 (D.C. Cir. 2000).

III. FIXCs CONCEDE THAT THE COMMISSION MAY APPROPRIATELY ADOPT NEW REPORTING REQUIREMENTS FOR SBR CALLS

MCI and Sprint both recognize the value of providing PSPs the additional information about SBR calls that APCC discussed in its comments, and indicate a willingness to accept a rule that requires such information to be provided, although both appear to condition their acceptance on the elimination of FIXCs' payment responsibility for the calls they terminate to SBR platforms. Specifically, MCI states:

> [A SBR's notification that it is qualified to directly compensate PSPs] will allow the SBR's FS-IXCs to begin tracking calls routed to each toll free number leased to this SBR from each payphone ANI which will be excluded from compensation. Underlying carriers should be required to provide a report with this tracking information to each PSP receiving a compensation payment from the qualifying SBR at the time of the next quarterly compensation payment.
>
> The data reports will ensure that PSPs will be able to compare the number of calls sent to each of an SBR's toll free numbers from each of their payphones to the payments received from the SBR for each toll free number to each of the PSP's payphones. This will allow the PSP to determine whether compensation payments appear reasonable on their face, or whether they will need to request additional information.

MCI at 27-28. Sprint states:

> Sprint suggests that the Commission could direct FS-IXCs to provide to PSPs, upon request, quarterly reports in electronic format to assist PSPs' own collection efforts. These reports would provide current SBR contact information, listing that SBR's toll free subscriber and access numbers, and identifying volumes, based on answer supervision, of calls routed from individual payphone ANIs to each of those SBR numbers.

Sprint at 22. This is essentially the same information that APCC proposes should be added to the existing disclosure requirements. APCC at 22-25.

Although Sprint contends that these information requirements are justified only if the payment obligation itself is shifted to SBRs, its attempt to explain why the information would only be useful in that context makes little sense, in light of the vehement complaints by Sprint and other FIXCs about the poor quality of the call completion data they receive from SBRs. Given the admittedly poor quality of SBR data, PSPs need detailed information on call volumes in order to maximize their ability to verify the accuracy of the payments.[19]

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[19] This is particularly true since, as Global Crossing's comments demonstrate, FIXCs regularly insist that they should not have to give any credence to data supplied by PSPs themselves. Global Crossing at 5-6. Interestingly, Sprint draws an apparent

Therefore, as FIXCs' conditional acceptance of such requirements confirms that they would not be unduly burdensome, the Commission should require FIXCs to disclose complete SBR contact information and ANI-by-ANI information on the volume of call attempts and completed calls for each toll free and access code number each reseller has received. This should be required in addition to existing requirements and similar APCC-proposed requirements with respect to non-reseller calls.[20]

Sprint also takes the position that FIXCs should not be liable for errors or omissions in SBR data on completed calls. *Id.* at 24. Such insulation from liability cannot be justified. The current rule deliberately relies on the fact that FIXCs are in a

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distinction between the call data provided by PSPs generally, which it has previously repeatedly stated has no value, and the call information captured by its own "smart" payphones, which it now claims "assist[s] in evaluating payphone compensation experience." Sprint at 7. Sprint apparently finds it useful to make this statement to support its claim that the shortfalls in SBR payments under the old rule have been exaggerated.

20 In stating its opposition to the current reporting requirements in the context of the current rule, Sprint claims that APCC previously "acknowledged that those requirements were excessive with the payment obligation on the FS-IXC." Sprint at 16-17. Sprint previously misstated APCC's position to the court of appeals, and even though APCC pointed out the misstatement at the time, Sprint continues to misstate APCC's prior position here. First, APCC explicitly limited its prior position to the context of a joint proposal that had been worked out with some of the FIXCs. Comments of APCC, filed October 9, 2001, at 6-11. As the Commission did not accept the proposal, APCC does not consider itself bound by its position taken two years ago in the context of that proposal. Second, and more fundamentally, APCC never said the current reporting requirements were "excessive." In fact, in the same filing cited by Sprint, APCC specifically stated that the current reporting requirements were "amply justified, based on record evidence" (*id.* at 4), that "call detail is also very important when the call involves only a facilities-based IXC" (*id.* at 5), and that the current requirements were not unduly burdensome (*id.* at 6).

position to use their relationships with their SBR customers to confirm the accuracy of call completion data provided by resellers. For the rule to be effective, the FIXCs must have an incentive to thoroughly check the accuracy of the data. This incentive would be lacking if the FIXC faces no responsibility for data that is inaccurate. In fact, the FIXC's would have a strong incentive to wink at inaccurate call completion data in order to lower its own compensation obligation.

IV. THE COMMISSION NEED NOT REVISIT THE CALLER PAYS ISSUE

Two FIXCs recycle, yet again, the argument made in virtually every comment cycle ever held in this docket, urging the Commission to replace the current system of prescribed carrier-paid dial-around compensation with a "caller-pays" approach. MCI at 29-34; Sprint at 19-21. While advancing no new arguments, these IXCs insist that this methodology is preferable to a cost-based methodology because it is "the most rational and efficient." *Id.* at 20. The Commission last rejected this approach in the *Third Report and Order*, and should not entertain it again here. As the *Third Report and Order* explained, "the statutory language and legislative history indicate Congress's disapproval of a caller-pays methodology." *Third Report and Order*, ¶ 115.[21]

Further, a caller-pays system would completely change the nature of dial-around calling and the nature of payphone service. The fundamental characteristic of toll-free

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[21] The Senate Report provides that section 226(e)(2) bars the Commission from concluding that compensation for compensable calls must be paid by the caller. *See* S. Rep. No. 101-439 at 20 (1990). Section 226(e)(2) provides that "[t]he Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones." 47 U.S.C. § 226(e)(2).

calling is that it is "free" to the caller. A caller-pays system would turn toll-free calling into toll calling. Similarly, a fundamental characteristic of payphones, as they currently exist, is that they offer callers the option to make "coinless" calls. If the Commission institutes caller-pays, there would be no such thing as a coinless payphone call.[22]

By forcing payphone users to have coins on hand to make previously coinless payphone calls, a caller-pays approach would do far more than any rate increase to suppress demand for payphone service. The statutory mandate for widespread payphone deployment would be effectively repealed. The Commission should not give any further consideration to a system that would injure consumers and PSPs in equal measure, place statutory goals out of reach, and benefit no one.

CONCLUSION

In accordance with the foregoing reply comments, the Commission should readopt, with the modifications discussed above, the compensation rule currently in effect.

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[22] Under Section 226 of the Act, if a PSP requires advance payment for access code calls, it must require access code payment for "0" and "0+" "operator-assisted" calls as well. 47 U.S.C. § 226(c)(1)(C). Therefore, under caller-pays, all coinless calling options would be eliminated.

Dated: July 3, 2003

Respectfully submitted,

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EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128 File No. NSD-L-99-34

DECLARATION OF ALLAN C. HUBBARD

1. I am an attorney that represents various payphone service provider ("PSP") claimants and/or clearinghouses (collectively "PSP Claimants"), I have supervised the preparation and prosecution of complaints filed at the Commission against switch-based resellers to collect unpaid per call dial around compensation due PSP Claimants for the period October 7, 1997 through November 22, 2001 ("Relevant Period"). I offer this Declaration in support of the American Public Communications Council's ("APCC's") reply comments opposing the suggestion by some parties in this proceeding that switch-based resellers ("SBRs") be assigned responsibility for payment of dial around compensation ("DAC") directly to PSPs.

2. I assumed responsibility for supervising the preparation and prosecution of complaints against SBRs at the Commission from Edward Modell in August 2002. At that time, Mr. Modell was also an attorney for PSP Claimants but he no longer is representing them. I am familiar with the experiences Mr. Modell had in filing complaints at the Commission against SBRs. Further, I have reviewed the various files

connected with past collection activities and am familiar with the history and overall context of PSP Claimant efforts to recover DAC from SBRs.

3. On behalf of PSP Claimants, Dickstein Shapiro has filed ten formal complaints and more than fifty informal complaints against various SBRs (including, in some cases, more than one informal complaint against an SBR in cases where the SBR is or may be a reseller of more than one underlying first facilities-based interexchange carrier ("FIXC")).

4. For a variety of reasons, the collection of dial around compensation from SBRs has been uniquely difficult. Many of these reasons were spelled out in the initial comments filed by APCC and various other parties in this proceeding. See, for example, Comments of APCC, 4-10 and attached Declarations of Ruth Jaeger and Arthur Cooper; Comments of Bulletins, 3-15; Comments of Qwest Communications International, Inc., 3-6, 11; RBOC Coalition's Comments, 5-6; and Comments of WorldCom, Inc., 4—11.

5. Based on my experience with the SBR complaint process, and in the context of my more than twenty-five years of representing telecommunications entities in carrier-carrier and carrier-customer disputes, I share the views expressed in the above-referenced comments that PSP collection of DAC from SBRs presents a highly and uniquely challenging task. Taken as a group, SBRs are unusually elusive, lack or are unwilling to allocate the resources necessary to track their DAC obligations, are unattractive litigation targets because they typically owe relatively small amounts of

DAC on an individual basis (but collectively owe a very significant percentage of total DAC), and, as a group, appear highly prone to underestimating their DAC obligations. Moreover, PSPs, because they cannot block calls to SBRs, have no economic leverage to exert in their collection efforts with SBRs. Unlike FIXCs, there is no plug PSPs can pull when an SBR refuses to pay the DAC it owes. The only leverage that PSPs have to induce SBRs to pay DAC is to resort to litigation or the threat of litigation. Yet, for the reasons enumerated below, complaints against SBRs are very difficult to pursue in a cost-efficient manner.

6. <u>Difficulty in cost-efficiently targeting SBRs</u>. SBRs that failed to pay DAC owed for compensable calls during the Relevant Period provide a target-rich environment. There are literally hundreds of such SBRs throughout the country. The difficulty for PSPs has been in identifying those SBRs that justify the expense of using the Commission's complaint process as a collection mechanism. Cost efficiency in pursuing SBRs before the Commission is particularly important because while the Commission provides a knowledgeable forum – which is valuable given the complexity of the law on SBR obligations to pay DAC – the Commission's processes do not provide for recovery of attorneys' fees or costs.

a. To warrant the expense of filing and prosecuting a complaint a target SBR should both (1) owe substantial DAC and (2) have the financial resources to pay their DAC obligation. Yet there has proven to be a paucity of reliable information both as to the amount of DAC owed and as to the financial resources of potential target SBRs.

(1) In theory, FIXC data as to calls completed to a SBR should provide some approximate gauge as to the number of compensable calls completed by the SBR to called parties and thus provide an estimate of DAC owed. Yet FIXCs provided PSP Claimants with SBR call data only on a sporadic and incomplete basis, if at all, and the data were not reliable. For example, one FIXC identified a particular entity as a SBR with a high volume of calls, and on that basis the PSP Claimants filed an informal complaint against that SBR. As it developed, data on the SBR's 800 numbers showed that the SBR did not obtain payphone calls from that FIXC, but rather from another FIXC. Yet the other FIXC, despite the SBR's high volume of calls, had failed to even name that SBR in the list that the FIXC provided to PSP Claimants.

(2) Determining the financial condition of potential target SBRs also is difficult. The vast majority of SBRs are not publicly traded companies, and conducting Internet, bankruptcy and other database searches and/or obtaining Dun and Bradstreet reports and other financial data has proven to be time consuming, expensive and not particularly reliable.

b. As a result, in a number of instances, complaints were filed against defendant SBRs that simply failed to respond to properly addressed Commission notices of complaints (in paragraph 7, I discuss name and address difficulties). Based on further research, many, although not all, of the non-responding defendant SBRs did not appear to warrant further pursuit.

c. Of the SBRs that responded to complaints, many turned out to be on the verge of bankruptcy and not worth the expense of pursuing. Only about one in five of the complaints filed to date have resulted (or are expected to result) in the collection of DAC.

7. Current SBR name and/or address challenges. Even after an SBR was identified as a target for a complaint, there have been difficulties in many instances with correlating the SBR's name and address as provided by an FIXC with the legal name and address of the SBR. Also, the SBR's name sometimes has been confusingly similar to the name of another entity or entities, or the SBR named by the FIXC has merged with or sold its assets to another entity.

a. In several instances, FIXCs provided the name and address of an accounting and back office service bureau, such as ACCA or Telephone Electronics Corporation, instead of the particular SBR represented by the service bureau. As a result, informal complaints had to be re-filed against particular SBRs resulting in at least a potential bar to recovery of a portion of the claims because of the statute of limitations.

b. In other instances, the names of SBRs have been confusingly similar:

- A Dallas-based SBR, United Technological Services, Inc., operated under the name "Uni-Tel, which was confusingly similar to an Illinois based carrier, "Uni-Tel Communications Group, Inc." (In addition, the Dallas-based SBR's corporate president was also the agent designated for service of process in Texas, yet he refused to accept certified mail either in his capacity as the SBR's registered agent or as its president).

- Another SBR, "Charter Communications International, Inc." had a name similar to "Charter Communications, Inc." although the two entities were not affiliated.

- The name of the New York-based "Telstar International, Inc." is confusingly similar to "Telestar International Corp." and to the Texas-based "Telstar Communications, Inc." The FIXC that identified the Telstar SBR in question provided the incorrect name – Tel*e*star International, Inc. – but provided the address which correlated with the correct carrier, Telstar International, Inc.

c. SBR name changes because of corporate mergers also add to the difficulty in filing and pursuing complaints:

- An FIXC identified "TekBilt World Communications" as an SBR. TekBilt had applied for and obtained section 214 authority from the Commission in 1999, but in late 1999, according to SEC filings, was acquired by Clariti Telecommunications International, Ltd. Based on Internet research we learned that Tekbilt was purchased by an entity named Carey Trading. Based on information obtained subsequently, it appeared that Tekbilt or its successor in interest probably did not owe sufficient DAC to warrant further pursuit.

- Another SBR against which PSP Claimants have informal complaints pending is Pennsylvania-based "ATX Telecommunications Services." We lay out here only a portion of the convoluted history of that entity. "ATX Telecommunications Services" obtained Section 214 authority, in that name, and subsequently, in 1998, filed a letter in that name listing a DC law firm as its DC agent for service of process. "ATX Telecommunications Services" is also listed in the appendices to the Commission's recent true up order as having significant per payphone DAC obligation to PSP Claimants for the period November 7, 1996 to date. A search of fictitious names on file with the Pennsylvania Secretary of State revealed a 1991 filing showing "ATX Telecommunications Services" as owned by Michael Karp. In 2002, an entity named "ATX Telecommunications Services, Ltd" filed a Form 499-A with the Commission listing its holding company as "ATX Communications, Inc." and its d/b/a entities as "ATX Communications, Inc.," "ATX Telecommunications Services, Inc." and "ATX Licensing, Inc." However, based on a search of the records of the Pennsylvania Department of State, "ATX Telecommunications Services, Ltd" was withdrawn as a limited partnership in early 2000 as a result of a merger. Based on a review of information available from the Pennsylvania and Delaware departments of state, and on SEC filings by ATX Communications, Inc. in 2003 and Corecomm Limited in 2002, it appears that "ATX Telecommunications Services, Ltd" was merged into "ATX Telecommunications Services, Inc." in 2000, that the name "ATX Telecommunications Services, Inc." was changed to "Corecomm Limited" and that in 2002 the name "Corecomm Limited" was changed to "CCL Historical, Inc." According to the 10K filed by ATX Communications, Inc. for 2002, "CCL Historical, Inc." was "merged into a wholly-owned subsidiary of ATX Communications, Inc." However, the 10K does not identify which wholly-owned subsidiary CCL Historical, Inc. was merged into, and indeed, according to our most recent research of the Delaware Division of Corporation records, CCL Historical, Inc. is still an existing corporation. Thus, we continue our quest to identify which current ATX entity is the successor-in-interest to ATX Telecommunications Services.

d. The time and expense required to research the foregoing SBR name and address issues was substantial and in some cases delayed the filing of complaints against the proper parties.

8. Failure to file and/or maintain required service of process information. Contributing to the problem of identifying SBRs is the SBRs' failure to comply with the Commission's Rules that could correctly identify and distinguish one SBR from another. SBRs have chronically failed to file and/or update the service of process information with the Chief of the Enforcement Bureau's Market Disputes Resolution Division as required by Section 1.47(h) of the Commission's Rules. Of the more than 50 SBRs against which PSP Claimants have filed complaints, only nine had even initially complied with the requirements of Section 1.47(h) and of those nine, at least three had on file information that was out of date. Moreover, of the carriers among the 50 members listed on the website of the International Prepaid Communications Association -- which has filed comments in this proceeding professing the willingness of its SBR members to comply with the Commission's Rules and that says its SBR members are meeting their DAC responsibilities -- only AT&T, NetworkIP, Qwest, Sprint and US South appear to have complied with section 1.47(h) of the rules (and NetworkIP's registered agent address information appears to be out of date).

9. SBRs either lack or are not willing to allocate the resources required to accurately compute their DAC obligations. To date, SBRs that have entered settlement

agreements to pay DAC invariably have resisted undertaking the task of computing their DAC obligations by comparing their switch records with PSP Claimants' ANI lists on a quarter by quarter basis (a task the SBRs already should have completed long ago). Instead, these SBRs, claiming scarce resources, lack of complete data due to computer crashes and/or other purported factors, have used proxy measures to estimate their DAC obligations. Even then, the SBRs have taken many weeks, or even many months, to complete computer runs on proxy quarters. This failure to allocate the necessary resources to accurately and timely compute DAC obligations appears to be endemic among the SBR industry as a whole.

10. SBRs that have entered settlement agreements to pay DAC have tended to use questionable call completion ratios. For those SBRs that have entered into settlement agreements to pay DAC, SBR representations as to numbers of compensable calls in most, although not all, cases have been suspiciously low. As noted above, PSP Claimants generally have not had access to reliable data on SBR call volume; however, in the isolated case of Global Crossing's SBRs, we recently obtained detailed call data, and a review of that data underscores the difficulty of negotiating with SBRs without first having a ready means of verifying the SBRs' compensable call calculations. Of the five Global Crossing SBRs with which PSP Claimants reached settlements, four appear to have based their settlements on highly suspect call completion ratios of between approximately five and fifteen percent of the payphone originated calls completed by Global Crossing to the SBR's switch or switches. Only one acknowledged a more realistic 62% call completion ratio.

11. Most SBRs that have agreed to scheduled DAC payments have failed to honor their agreements. The SBRs that requested payment plans as part of settlement agreements have, with one exception, breached their agreements by failing to make timely payments subsequent to their initial payments. Of the four SBRs that entered settlement agreements with PSP Claimants that allowed payments to be made over time, three of the SBRs have consistently failed to make timely payments after the initial payment. Subsequent payments only have been made after issuance of default letters or the initiation of additional legal action.

12. Varying interpretations of Commission orders as to SBR responsibility for payment of DAC. Another difficulty with pursuing complaints at the Commission against SBRs has been the varying interpretations of Commission orders as to SBR responsibility for payment of dial around compensation. For defendant SBRs of all FIXCs except two involving a relatively small number of SBRs that we have pursued, the response to complaints often was that the SBR's FIXC was responsible for payment of DAC. In another case, the defendant SBR asserted that it had contractually delegated any responsibility it had for payment of DAC to its switchless reseller customers. Of the dozens of complaints pursued, this part of the process has been straightforward in the instance only of the SBRs whose FIXCs were Global Crossing or Cable & Wireless. Those two carriers provided: (1) a list of their SBRs that had signed agreements in which the SBR explicitly acknowledged responsibility for payment of DAC and (2) copies of the relevant agreements.

13. <u>Segregating calls routed to an SBR for completion from calls handled by the FIXC for the SBR on a switchless basis</u>. We encountered SBRs who used their FIXCs to originate *and terminate* calls as though the SBR were a switchless carrier. It was difficult getting those SBRs to segregate the calls they received and completed on an SBR basis from the calls that the FIXC completed for the SBR as though the SBR were a switchless reseller.

14. <u>Miscellaneous</u>. The foregoing difficulties are only illustrative of the more common challenges faced in collecting DAC from SBRs. Numerous other issues arose on a case-by-case basis that ran the gamut from having to deal with SBRs that chose not to be represented by counsel to SBRs that engaged in extensive negotiations for small amounts of DAC. These issues consumed significant time and expense, generally without any resulting payoff in terms of collection of significant, if any, DAC.

14. <u>Conclusion</u>. In sum, given PSPs' lack of leverage vis a vis the SBRs and given the inherently frustrating experience to date that PSPs have had in collecting DAC from SBRs, the Commission should not again place PSPs in the untenable position of having to collect DAC directly from SBRs.

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2003, the foregoing Reply Comments of the American Public Communications Council on Further Notice of Proposed Rulemaking was filed electronically and that copies were served on the parties (except those marked with an asterisk) via first-class mail. Copies are being served on the parties marked with an asterisk (*) via electronic mail on July 3, 2003 and by hand-delivery on July 7, 2003.

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